Yeoh Khoon Chooi v Patto a/l Perumal & Anor (Asoghan a/l Govindaraju, Applicant)

HIGH COURT (PENANG) — ELECTION PETITION NO PP-2-1995
ANUAR CJ
28 AUGUST 1995

Elections *— Petition — Recount and/or scrutiny of votes — Whether there had been failure to observe due process of law — Whether court had inherent jurisdiction — Whether request for recount must be made to presiding officer at polling station — Elections (Conduct of Elections) Regulations 1981 regs 25(13)(b) & 25D(5A)*

The petitioner and the first respondent were candidates at the general elections held on 25 April 1995. The second respondent was the returning officer. The petitioner and the first respondent obtained 26,406 and 26,524 votes respectively. As a result, the first respondent was declared the winner by a majority of 118 votes and accordingly elected and returned to the parliamentary constituency of Bagan. On 24 June 1995, the petitioner filed his election petition. He stated that at about 11.45pm his authorized agent requested the returning officer for a recount of the votes which request was refused. He stated that as the difference between the number of votes cast for the respondent and the petitioner was less than 1% of the total number of votes cast ie a very slim majority, the court could under its inherent jurisdiction order a recount and/or scrutiny of the votes.

The first respondent passed away on 12 July 1995 and another registered voter of the parliamentary constituency applied to be a respondent in the petition which was granted.

The applicant/respondent also applied to strike out the petition on the ground that the petitioner did not disclose any reasonable cause of action.

Held, dismissing the petition:

(1) The inherent jurisdiction of the court was to be exercised with certain principle, the most important being to ensure the observance of the due process of law in order to do justice between contesting parties.

(2) Under reg 25(13)(b) of the Elections (Conduct of Elections) Regulations 1981, it was clear that any application for a recount should be made before the presiding officer carried out the proceedings set out in para 12, ie before the presiding officer made the announcement of the result of the counting of votes at his polling station. An application for a recount could only be made to a presiding officer at the polling station who would decide whether to accede to the request or not and this

application could only be made at the polling station. No other person had the power to order a recount.

(3) Under reg 25D(5A) of the Elections (Conduct of Elections) Regulations 1981, a candidate might require the returning officer to have the number of votes recorded in the official statement of the poll to be added up again. It was not a recount of votes. Therefore, a returning officer had no power to carry out a recount of votes.

(4) The petitioner, through his agent, had made a request to the returning officer for a recount of votes which was refused. Clearly, this request was made to the wrong person and it was rightly refused by the returning officer.

Per curiam:

In an election petition there could be no room for the exercise of the inherent jurisdiction of the High Court. The statutory requirements of election law must be strictly observed. The primary purpose of the diverse provisions of election law which might appear to be technical was to safeguard the purity of the election process and the courts would not ordinarily minimize their operation.

[Bahasa Malaysia summary

Pempetisyen dan penentang pertama adalah calon-calon di pilihanraya umum yang diadakan pada 25 April 1995. Penentang kedua adalah pegawai pilihanraya. Pempetisyen dan penentang pertama memperolehi 26,406 dan 26,524 undi masing-masing. Kesudahannya, penentang pertama diisytiharkan pemenang dengan kelebihan undi 118 dan oleh itu dipilih mewakili kawasan pilihanraya Bagan. Pada 24 Jun 1995, pempetisyen memfailkan petisyen pilihanrayanya. Beliau menyatakan bahawa kira-kira pada 11.45 malam, ejen yang diberikuasanya telah meminta pegawai pilihanraya mengira semula undi tetapi permintaan itu ditolak. Beliau menyatakan bahwa oleh kerana perbezaan di antara bilangan undi yang dibuang untuk penentang pertama dan pempetisyen kurang daripada 1% jumlah undi yang dibuang, yakni satu kelebihan undi yang sangat tipis, mahkamah boleh di bawah bidang kuasa sedia adanya memerintahkan satu pengiraan semula dan/ atau penelitian undi itu.

Penentang pertama meninggal dunia pada 12 Julai 1995 dan seorang pemilih berdaftar yang lain dalam kawasan pilihanraya itu memohon untuk menjadi penentang kepada petisyen ini dan permohonan itu dibenarkan.

Pemohon/penentang juga memohon untuk membatalkan petisyen itu atas alasan bahawa pempetisyen tidak menunjukkan sebarang kausa tindakan yang munasabah.

Diputuskan, menolak petisyen itu:

(1) Bidang kuasa sedia ada mahkamah mesti dilaksanakan mengikut prinsip-prinsip tertentu, yang paling penting antaranya adalah memastikan pematuhan proses undang-undang yang patut supaya melakukan apa yang adil di antara kedua pihak yang bertanding itu.

(2) Di bawah peraturan 25(13)(b) Peraturan Pilihanraya (Penjalanan Pilihanraya) 1981, adalah jelas bahawa sebarang permohonan untuk pengiraan semula patut dibuat sebelum pegawai yang berkuasa menjalankan prosiding yang dinyatakan di dalam perenggan 12, yakni sebelum pegawai yang berkuasa membuat pengumuman keputusan pengiraan undi di stesyen pembuangan undinya. Satu permohonan untuk pengiraan semula hanya boleh dibuat kepada pegawai yang berkuasa di stesyen pembuangan undi yang akan memutuskan sama ada menyetujui atau tidak permintaan itu dan permohonan itu hanya boleh dilakukan di stesyen pembuangan undi. Tiada orang yang lain yang mempunyai kuasa untuk mengarahkan satu pengiraan semula.

(3) Di bawah peraturan 25D(5A) Peraturan Pilihanraya (Penjalanan Pilihanraya) 1981, seorang calon boleh memerlukan pegawai pilihanraya menjumlahkan semula bilangan undi yang dicatatkan di dalam pernyataan rasmi pilihanraya itu. Ianya bukan satu pengiraan semula undi. Oleh itu, pegawai pilihanraya tidak mempunyai kuasa untuk melakukan pengiraan semula undi.

(4) Pempetisyen, melalui ejennya, telah membuat permintaan kepada pegawai pilihanraya untuk satu pengiraan semula undi yang telah ditolak. Jelasnya, permohonan ini telah dibuat kepada orang yang salah dan ianya telah ditolak dengan betul oleh pegawai pilihanraya.

Per curiam:

Di dalam satu petisyen pilihanraya, tidak ada kesempatan untuk penggunaan bidang kuasa sedia ada oleh mahkamah. Kehendak statutori undang-undang pilihanraya mesti dipatuhi dengan tegas. Tujuan asas peruntukan-peruntukan yang berlainan dalam undang-undang pilihanraya yang mungkin kelihatan teknikal adalah untuk menjaga ketulinan proses pilihanraya dan mahkamah biasanya tidak akan mengongkong operasi mereka.]

Notes

For cases on elections, see 6 *Mallal's Digest* (4th Ed) paras 1075–1117; [1990] *Mallal's Digest* paras 587–591; [1991] *Mallal's Digest* paras 1041–1047; [1992] *Mallal's Digest* paras 916–918; [1993] *Mallal's Digest* paras 744–751; [1994] *Mallal's Digest* paras 1232–1235.

Case referred to

Harcharan Singh v Mohinder Singh AIR 1968 SC 1500 (folld)

Legislation referred to

Election Offences Act 1954 s 36
Election (Conduct of Elections) Regulations 1981 regs 25(13)(b), 25D(5A)

RJ Manecksha (*Ong & Manecksha*) for the petitioner.
Karpal Singh, K Balasundaram and *Jagdeep Singh Deo a/l Karpal Singh* (*Balasundaram & Co*) for the first respondent.
Al-Baishah bt Hj Abdul Manan and *Syed Marzidy* (State counsel) for the second respondent.

Anuar CJ: This is an election petition filed by the petitioner Yeoh Khoon Chooi who was a candidate at the general elections held on 25 April 1995.

The first respondent P Patto was also a candidate at the general elections held on 25 April 1995.

The second respondent, Mohd Zahari bin Senu, was the returning officer.

The petitioner obtained (polled) 26,406 votes. The first respondent obtained 26,524 votes. As a result, the first respondent was declared the winner by a majority of 118 votes and accordingly elected and returned to the parliamentary constituency of Bagan.

The petitioner is dissatisfied with the result of the election and therefore instituted the election petition proceeding. The petitioner filed his election petition on 24 June 1995.

The petitioner in his petition states that at about 11.45pm his authorized agent, Ooi Bak Koh @ Wei Bak Hoe, requested the returning officer for a recount of the votes cast in the parliamentary constituency. The request was refused.

The petitioner states that he is aggrieved at the refusal of the returning officer to the request in view of the fact that the majority was a very slim majority. The difference between the number of votes cast for the respondent and the petitioner is less than 1% of the total number of votes cast. In view of the very slim majority the petitioner states in the petition that the court could under its inherent jurisdiction order a recount and/or scrutiny of the votes.

The first respondent passed away on 12 July 1995 before the date of the hearing of the election petition.

Subsequently, Asogan a/l Govindaraju, a registered voter in the Parliamentary Constituency of Bagan, applied to be made a respondent in the petition. This application was fixed for hearing on 24 August 1995. On 24 August 995, the applicant was named a respondent in the petition as there was no objection to the application.

A The applicant also applied to strike out the petition on the ground that the petition does not disclose any reasonable cause of action.

At the outset the learned counsel for the applicant/respondent urged the court to hear the applicant/respondent's application first before hearing the petition itself. The court agreed with the application B to hear the objection raised by the applicant/respondent first.

The objections raised by the applicant/respondent are set out in his affidavit in (encl 23):

> 2(1) The contention by the petitioner that the court has inherent jurisdiction to order a recount and/or scrutiny of the votes or that C there was a breach of the rules of natural justice is misconceived and unsupportable in law;
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> (2) The petitioner has not specifically stated in his petition non-compliance with any specific provision of any written law relating to any election and further that such non-compliance has affected the result of the election;
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> D (3) The petition is in breach of r 4(1)(a) of the Election Petition Rules 1954 in that it does not state the right of the petitioner to petition within s 34 of the Election Offences Act 1954;
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> (4) The petition does not ask for any prayer that the petitioner be declared duly elected or duly returned and
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> E (5) A recount can only be ordered by the presiding officer of a polling station pursuant to the provisions of reg 25(13) of the Elections (Conduct of Elections) Regulations 1981 and not by the returning officer at a tallying centre where the votes are tallied after results are received from the respective polling stations in a constituency whence the returning officer at the conclusion of the tallying officially declares F the result relating to the election in that constituency.

It is clear from the petition that the petitioner is asking the court to exercise its inherent jurisdiction as stated in para 11 of the petition.

The terms inherent jurisdiction of the court have been described in 37 *Halsbury's Laws of England* (4th Ed) para 14 in the following G words:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, in particular to H ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

The inherent jurisdiction of the court therefore is to be exercised with certain principle, the most important being to ensure the observance of the due process of law in order to do justice between contesting parties. I

In the case before us the question to be asked is whether there has been a failure to observe the due process of law. The complain by the petitioner is that he was not given the right to have a recount of votes cast at the election. It is necessary to examine the relevant provisions of

the rules regarding the procedure for a recount. Regulation 25(13)(b) of the Elections (Conduct of Elections) Regulations 1981 reads as follows:

> Where —
>
> (a) the number of votes for all the ... per centum or more; or
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> (b) the difference between the number of votes cast for the leading candidate and the number of votes cast for the next leading candidate is two per centum or less of the total number of votes cast,
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> then upon the application of either any candidate or of his election agent or counting agent a recount shall be made once only before the presiding officer carry out the proceedings set out in para (12) ...

Regulation 25D(5A) of the Elections (Conduct of Elections) Regulations 1981 reads as follows:

> A candidate or his election agent may, after the completion of the official additions of votes, require the returning officer to have the number of votes recorded in the official statement of the poll to be added up again but the returning officer may refuse to do so if in his opinion the request is unreasonable.

It is clear that any application for a recount shall be made before the presiding officer carry out the proceedings set out in para 12. That is before the presiding officers makes the announcement of the result of the counting of votes at his polling station. An application for a recount therefore can only be made to a presiding officer at the polling station who will decide whether to accede to the request or not and this application can only be made at the polling station. The rule is very clear that no other person has the power to order a recount.

Under reg 25D para (5A) it is provided that a candidate may require the returning officer to have the number of votes recorded in the official statement of the poll to be added up again. The returning officer may refuse to do so if in his opinion the request is unreasonable. Again it is clear to me that the only request that can be made under this rule is for the number of votes recorded to be added up again. It is not a recount of votes. Therefore, a returning officer has no power to carry out a recount of votes. If a candidate asks the returning officer to carry out a recount of votes that request would obviously be refused. The returning officer would be right to refuse such a request.

From the facts of the case before us the petitioner, through his agent, had made a request to the returning officer for a recount of votes which was refused. Clearly this request was made to the wrong person and it was rightly refused by the returning officer. There is no evidence to show whether the petitioner or his agent had made any request to the presiding officer for a recount of votes at the polling station.

I am sure the petitioner is fully aware of the provisions of these rules. He could have availed himself of the right for a recount had he so wished. But he did not do so. His reason for not doing so is that he would not be able to ascertain the winning margin until the number of

votes cast at the various polling stations has been added. But I do not think this is a good excuse or a good reason for the petitioner not to comply with the provisions of the regulations which is very plain and clear. It is not open to the petitioner to make his own ruling as to when he should decide to request for a recount. The rule has already clearly set out when and where a request for a recount should be made if he wishes to have the votes recounted. If the petitioner does not follow the clear and unambiguous rules as provided he cannot complain of any breach of natural justice against him. The petitioner cannot say that the returning officer had failed to observe the due process of law. No injustice therefore has been done to the petitioner. In the circumstances I do not think the court can exercise its inherent jurisdiction to remedy something which has not been wronged.

In any event I am of the view that in an election petition there can be no room for the exercise of the inherent jurisdiction of the High Court. I hold this view because it is settled law that the statutory requirements of election law must be strictly observed. The primary purpose of the diverse provisions of election law which may appear to be technical is to safeguard the purity of the election process and the courts will not ordinarily minimize their operation: *Harcharan Singh v Mohinder Singh* AIR 1968 SC 1500. The court would not exercise its inherent power to interfere the operation of the Election Petition Law.

Having said this I do not think it necessary for me to deal with and consider the other grounds of objection raised by the applicant/respondent. I agree with the applicant/respondent's contention that there is no cause of action disclosed in the petition and would therefore dismiss the petition with costs to the respondents.

I order that, under s 36 of the Election Offences Act 1954, the respondent P Patto was duly elected.

Petition dismissed.

Reported by TC Chong